

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12242-1598

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

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November 27, 1996

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: In the Matter of Amendment of the Commission's Rules
to Permit Flexible Service Offerings in the Commercial
Mobile Radio Services - WT Docket No. 96-6

Dear Secretary Caton:

The New York State Department of Public Service (NYDPS) hereby submits this letter in lieu of comments in response to the Federal Communications Commission's (Commission) Further Notice of Proposed Rulemaking (Notice) regarding the regulatory treatment of fixed wireless services. The Commission states that Commercial Mobile Radio Service (CMRS) providers may use their allotted spectrum to provide fixed wireless services on a co-primary basis for fixed services, mobile services, or any combination of the two.¹ In addition, the Commission reaffirms its determination that ancillary, auxiliary, and incidental services offered by CMRS providers are subject to CMRS regulation. Id.

Here, the Commission seeks comment on its proposal "to establish a rebuttable presumption that any wireless service provided under a CMRS provider's license would be considered to fall within the definition of CMRS and consequently regulated as CMRS." Id. As demonstrated below, the Commission's presumption that any wireless service, unless a party proves otherwise, is CMRS is incorrect as applied to fixed wireless services. Instead, the burden should rest with the provider to make an

¹ In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order, WT Docket No. 96-6, at 3.

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affirmative showing that the service being provided constitutes CMRS, as intended under the 1934 Act.

Fixed wireless services could include telecommunications services provided to customers in fixed location without wires, by radio. The example of a potential fixed wireless services cited by the Commission - wireless local loop connecting residences or businesses with wireline local exchange networks - is not CMRS service and therefore cannot be regulated as CMRS.

A commercial mobile service provider must provide a mobile service in order for such service to be afforded regulatory treatment under Section 332. Mobile service is defined as "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves...."¹ In order to qualify as mobile service, one of the two stations must be mobile (capable of moving or being moved).² In the case of fixed wireless services provided using a landline station, the mobile criterion is not met. In this instance, both stations are fixed, and therefore the service provided does not constitute a commercial mobile service under the Communications Act. Instead, to the extent the service is an intrastate service, the Commission's jurisdiction is limited under Section 152(b) of the Communications Act.

The fact that fixed wireless services involve technology that is also used in mobile services does not make fixed service mobile, as demonstrated above. Indeed, intrastate landline calls are occasionally routed over wireless systems, but such routing does not make them CMRS.³ Moreover, the mere fact that the provider holds a CMRS license does not make the service CMRS. Stating that the regulatory treatment afforded under Section 332 applies to fixed wireless services is tantamount to saying that for purposes of determining jurisdiction, the service provider is more relevant than the provided service. In the example cited, the fixed wireless service provided is clearly local in nature, albeit through the use of wireless loops.

¹ 51 USC §3(27).

² 51 USC §3(28).

³ In the same manner, a call from a landline customer to a cellular phone would not subject the landline service to Section 332 regulatory treatment.

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For all of the reasons explained above, the Commission should not adopt a rebuttable presumption that any wireless service provided under a CMRS provider's license should be regulated as CMRS. Instead, the burden should rest with the provider to make an affirmative showing that the service being provided constitutes CMRS, as intended under the 1934 Act.

Respectfully submitted,

Maureen O. Helmer per MS

Maureen O. Helmer
General Counsel
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-2510

Of Counsel:
Mary E. Burgess

Dated: November 27, 1996
Albany, New York

WT Docket No. 96-6

In the Matter of

Amendment of the Commission's Rules to
Permit Flexible Service Offerings in the
Commercial Mobile Radio Services

Comments of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Mary E. Burgess, hereby certify that an original and eleven copies of the comments of the NYDPS in the above-captioned proceeding were sent via Airborne Express to Mr. Caton, and by First Class United States Mail, postage prepaid, to all parties on the attached service list.

Mary E. Burgess *rr DD*
Mary E. Burgess
Assistant Counsel
Office of General Counsel
NYS Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 473-8123

Dated: November 27, 1996
Albany, New York

James Lanni
Rhode Island Division
of Public Utilities
100 Orange Street
Providence RI 02903

Joel B. Shifman
Maine Public Utility Commission
State House Station 18
Augusta ME 04865

Charles F. Larken
Vermont Department of
Public Service
120 State Street
Montpelier VT 05602

Rita Barmen
Vermont Public Service Board
89 Main Street
Montpelier VT 05602

Keikki Leesment
New Jersey Board of
Public Utilities
2 Gateway Center
Newark NJ 07102

Veronica A. Smith
Deputy Chief Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Mary J. Sisak
District of Columbia
Public Service Commission
Suite 800
450 Fifth Street
Washington DC 20001

Telecommunications Report
1333 H Street, N.W. - 11th Floor
West Tower
Washington DC 20005

International Transcription
Services, Inc.
2100 M Street, NW
Suite 140
Washington DC 20037

Brad Ramsay
NARUC
Interstate Commerce
Commission Bldg., Room 1102
12th & Constitution St., NW
Washington DC 20044

William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Camille Stonehill
State Telephone Regulation
Report
1101 King Street
Suite 444
Alexandria VA 22314

Alabama Public Service
Commission
1 Court Square
Suite 117
Montgomery AL 36104

Archie R. Hickerson
Tennessee Public Service
Commission
460 James Robertson Pky.
Nashville TN 37219

Sandy Ibaugh
Indiana Utility
Regulatory Commission
901 State Office Bldg.
Indianapolis IN 46204

Ronald Choura
Michigan Public
Service Commission
6545 Mercantile Way
Lansing MI 48910

Mary Street
Iowa Utilities Board
Lucas Building
5th Floor
Des Moines IA 50316

Gary Evenson
Wisconsin Public
Service Commission
P.O. Box 7854
Madison WI 53707

Gordon L. Persinger
Missouri Public Service
Commission
P.O. Box 360
Jefferson City MO 65102

Sam Loudenslager
Arkansas Public Service
Commission
1200 Center Street
P.O. Box C-400
Little Rock AR 72203

Maribeth D. Swapp
Deputy General Counsel
Oklahoma Corp. Commission
400 Jim Thorpe Building
Oklahoma City OK 73105

Marsha H. Smith
Idaho Public Utilities
Commission
Statehouse
Boise ID 83720

Edward Morrison
Oregon Public Utilities
Commission
Labor and Industries Bldg.
Room 330
Salem OR 97310

Mary Adu
Public Utilities Commission of the
State of California
505 Van Ness Avenue
San Francisco CA 94102

Rob Vandiver
General Counsel
Florida Public Service
Commission
101 East Gaines Street
Tallahassee FL 32301

Glenn Blackmon
Washington U&TC
1300 S. Evergreen Park Dr., S.W.
P.O. Box 47250
Olympia WA 98504-7250

Policy and Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 544
Washington DC 20554

Myra Karegianes
General Counsel
Illinois Commerce Commission
State of Illinois Building
160 No. LaSalle - Suite C-800
Chicago IL 60601-3104

Margie Hendrickson
Assistant Attorney General
Manager, Public Utilities Division
121 7th Place East, Suite 350
St. Paul MN 55101

Robin McHugh
Montana PSC
1701 Prospect Avenue
P.O. Box 202601
Helena MT 59620-2601

Cynthia Norwood
Virginia State Corp. Commission
P.O. Box 1197
Richmond VA 23201

Deonne Brunning
Nebraska PSC
1200 N. Street
Lincoln NE 68508

Janice Myles
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington DC 20554